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No. 280

In the Supreme Court of the United States

OCTOBER TERM, 1961

OTIS HARRISON, TRUSTEE, PETITIONER

v.

DAVID S. PHILLIPS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys,
Department of Justice,
Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, p. 3a) is reported at 289 F. 2d 927. The district court's opinion (R. 14–21; Pet. App. B, pp. 5a–11a) is reported at 185 F. Supp. 204.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1961 (Pet. App. B, p. 4a). The petition for a writ of certiorari was filed on August 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a sale by auction of government real estate found to be surplus in 1960 in alleged disregard of the owner's right to repurchase under Section 23 of the Surplus Property Act gave rise to a claim upon which relief can be granted even though Section 23 expired by its own terms three years following the cessation of hostilities in World War II, which occurred on December 31, 1946, and even though Congress had also repealed Section 23, effective December 31, 1949.

2. Whether an action seeking to establish a priority right to purchase certain federal property which is brought against the Regional Commissioner of the General Services Administration constitutes an attempt to sue the United States without its consent.

STATUTES INVOLVED

The relevant portions of the Surplus Property Act of 1944, 58 Stat. 765, as amended by the Act of August 7, 1946, 60 Stat. 886, provided:

* * * * *

> SEC. 23(d)(1((A). In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom such property was acquired shall be given notice, in such manner (which may include publication) as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice: *Provided*, That such period shall be

extended in any case when it appears that such extension is necessary or appropriate to facilitate the sale of any surplus real property under this subsection.

* * * * *

SEC. 38. Unless extended by law, this Act shall expire at the end of three years following the date of the cessation of hostilities in the present war. For the purposes of this section the term "date of the cessation of hostilities in the present war" means the date proclaimed by the President as the date of such cessation, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such cessation, whichever is the earlier.

* * * * *

The relevant portion of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, provides:

* * * * *

SEC. 502(a). There are hereby repealed—(1) the Surplus Property Act of 1944, as amended (except sections 13(d), 13(g), 13(h), 28, and 32(b)(2)), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947: *Provided*, That, with respect to the disposal under this Act of any surplus real estate, all priorities and preferences provided for in said Act, as amended, shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949 * * *.

* * * * *

STATEMENT

The petitioner sought a judgment declarative of his right to repurchase realty from the United

States in an action against the Regional Commissioner of the General Services Administration (R. 4–11). Federal officers were alleged to have represented in 1945, the time of the purchase, that under the Surplus Property Act of 1944, 58 Stat. 765, the petitioner would have the right to repurchase if and when the realty ceased to be used by the Government and was declared to be surplus (R. 5). The property was declared to be surplus in 1960 and offered for sale by public auction (R. 9–10). The petitioner was informed that his right to repurchase his former property no longer existed because all priorities and preferences under the Surplus Property Act of 1944 were terminated on December 31, 1949, by the Federal Property and Administrative Services Act of 1949, 63 Stat. 377.

On the respondent's motion, the district court dismissed the action upon the ground that the complaint did not state a claim upon which relief could be granted (R. 14–21; Pet. App. B, pp. 5a–11a). The court of appeals affirmed *per curiam,* expressing "agreement with the conclusion reached by the district court * * *" (Pet. App. B, p. 3a).

ARGUMENT

1. The district court was correct in dismissing the complaint for failure to state a claim upon which relief can be granted.

(*a*) The Surplus Property Act of 1944 conferred no permanent right, but granted only a temporary privilege to repurchase surplus property, which expired, under Section 38, "at the end of three years following the date of the cessation of hostilities in the present war. For the purposes of this section the

term 'date of the cessation of hostilities in the present war' means the date proclaimed by the President as the date of such cessation * * *." On December 31, 1946, the President proclaimed the cessation of hostilities. Proclamation No. 2714, 61 Stat. 1048. If there could be any doubt about the effectiveness of this proclamation to terminate any rights of repurchase as of December 31, 1949, it was removed by Section 502(a) of the Federal Property and Administrative Services Act of 1949, which repealed the Surplus Property Act of 1944 with the proviso that all priorities and preferences "shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949 * * *." Thus, after the stated time no previously existing priority or preference could serve as the basis of a right to repurchase surplus property. The property which petitioner claims the right to repurchase was not declared to be surplus until 1960.

This interpretation of the two statutes is confirmed by the legislative history[1] and by the opinions of those courts which have considered the statutes.[2] The petitioner's argument that Congress intended to confer upon former owners permanent repurchase priorities (Pet. 7–8), assumes a congressional purpose to place a cloud on real estate titles in perpetuity, which is an assumption which "[c]ourts [will]

[1] See H. Rep. No. 1757, 78th Cong., 2d Sess., p. 9 (1944); Hearings on H.R. 2781 before a Subcommittee of the House Committee on Expenditures in the Executive Departments, 81st Cong., 1st Sess., pp. 10-11, 48 (1949).

[2] *Seiden* v. *Larson*, 188 F. 2d 661, 664 and fn. 8 (C.A.D.C.), certiorari denied, 341 U.S. 950; *Mason* v. *United States*, 169 F. Supp. 507 (C. Cls.); *Highsmith* v. *Southwestern Medical Foundation*, 116 F. Supp. 958 (N.D. Tex.).

not lightly imply * * *." *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 627.

(*b*) Contrary to petitioner's contentions (Pet. 5, 8), since the repurchase priority was temporary and in the nature of a gratuity, and since the petitioner could have no contractual right in perpetuity to repurchase the property, no federal officer had authority to bind the United States to the contrary.[3]

(*c*) Finally, petitioner's reliance on the contract to convey (Pet. 11–12) is misplaced. There is no basis for petitioner's invoking corollaries or exemption to the parol evidence rule which would permit evidence of unrecited consideration, even if the contract to convey were assumed to be ambiguous, for the 1945 deed conveying the land to the United States recites receipt of consideration in the amount of $28,200.00 and appears on its face to express the complete agreement of the parties in all essential terms (App., *infra*, pp. 9–12). It conveys the fee title to the United States without any reservations and is silent as to any representations with respect to the right of the petitioner to repurchase.

2. Dismissal was also proper because the action against the Regional Commissioner of the General Services Administration constituted an attempt to sue the United States without its consent. Petitioner's suit has failed to qualify, under any one of the four criteria established by this Court in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–691,

[3] See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384; *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294; *United States* v. *San Francisco*, 310 U.S. 16, 31–32; *Whiteside* v. *United States*, 93 U.S. 247, 255–258.

as a suit against an officer of the sovereign which is not one against the sovereign itself.[4]

(*a*) In the first place, even petitioner does not claim that this is a suit against an officer of the sovereign who purports to act as an individual (see *Larson, supra,* 337 U.S. at 689), for the complaint is directed against the respondent in his official capacity (see R. 4–11). Moreover, the respondent could only have authority in his capacity as a government officer to sell the property involved here to the petitioner.

(*b*) Moreover, it cannot be claimed that the action of the Regional Commissioner in offering the property for sale at public auction instead of allowing the petitioner to repurchase the property was in excess of his statutory authority. See *Larson, supra,* 337 U.S. at 689, 691. Both the 1944 and 1949 statutes provided for the termination of the priority to repurchase surplus property as of December 31, 1949. See *supra,* p. 5. In refusing to allow the petitioner a priority to repurchase the property, the Regional Commissioner specifically followed the provisions of the statutes.

(*c*) Nor can it be claimed that the Regional Commissioner acted under an unconstitutional statute so that his authority was not validly conferred. See *Larson, supra,* 337 U.S. 690, 691. Contrary to the petitioner's analysis (Pet. 2, 8), the 1949 Act, in repealing the 1944 Act, neither extended nor reduced any privileges created by the earlier statute. More-

[4] See also the criteria outlined in the dissenting opinion of Mr. Justice Frankfurter in *Larson*, 337 U.S. at 709–710, and the list of cases in the Appendix, *id.*, at 729–732.

over, even if the contrary were true, Congress would nevertheless have had the constitutional power to modify or terminate those privileges. See *Alabama* v. *Texas*, 347 U.S. 272, 273.

(*d*) Finally, dismissal was proper in the absence of the United States as a party, because the suit involved the "disposition of unquestionably sovereign property." *Larson, supra*, 337 U.S. 691, n. 11; see dissenting opinion in *Larson, id.* at 712. It is true, as petitioner points out (Pet. 13–14), that the exact significance of this final criterion of sovereign immunity has been disputed in the Court of Appeals for the District of Columbia. Compare *Seiden* v. *Larson, supra*, 188 F. 2d at 665–666, with *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582, 595–596 (C.A.D.C.), certiorari denied, 347 U.S. 989. But see the separate opinions of Judges Prettyman and Bazelon (*id.* at 612–613), Judges Washington and Edgerton (*id.* at 613), and Judge Fahy (*ibid.*). But regardless of the validity of this final criterion, the petitioner's suit must be dismissed for failure to qualify under any one of the other criteria as a suit against a government officer in his individual capacity.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

AUGUST 1961.

APPENDIX

GENERAL WARRANTY DEED

STATE OF TEXAS,
County of Harris:

KNOW ALL MEN BY THESE PRESENTS:

That we, F. M. Harrison and wife, Florence Harrison, and Otis Harrison, Trustee, all of the County of Harris, State of Texas, for and in consideration of the sum of Twenty-eight Thousand Two Hundred Dollars ($28,200.00) to us cash in hand paid by the United States of America, receipt of which is hereby acknowledged and confessed, have bargained, sold and conveyed, and by these presents do bargain, sell and convey unto the United States of America the following described tract of land, situate, lying and being in the County of Harris, State of Texas, and being more particularly described as follows:

> That certain parcel or tract of land lying and being situated in the Wm. M. Jones League, Harris County, Texas (Abstract No. 482, Patent No. 371) and being the west two hundred eighty-two and no one hundredths (282.00) acres of a four hundred eighty-six and fifty-six hundredths (486.56) acre tract of land belonging to Otis Harrison, Trustee, more particularly described as: Beginning at the point of intersection of the south right-of-way line of Spencer Highway (Main Street extension, La Porte) with the west line of the Wm. M. Jones League, said point being southerly, fifty (50) feet at right angle from the center line of said highway and marked by a 1" iron pipe; thence with and along the west line of the Wm. M. Jones League S. 01°11' E. on a true bearing, a distance of forty-six hundred fifty three

(4653) feet to a point on the north right-of-way line of Cardiff Road ("J" Street extension, La Porte), marked by a 1" iron pipe; thence with and along the north right-of-way line of Cardiff Road, (parallel and forty (40) feet north of its center line) N. 88 53' E. a distance of twenty-six hundred and forty (2640) feet to a point marked by a 1" iron pipe; thence N. 01°11' W. a distance of forty-six hundred fifty three (4653) feet to a point on the south right-of-way line of Spencer Highway, said point marked by a 1" iron pipe; thence with and along the south right-of-way line of Spencer [illegible] south of its center line, S. 88°53' W. a distance of twenty-six hundred forty (2640) feet to the point of beginning, and containing two hundred eighty-two (282.00) acres of land.

To Have and To Hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said United [sic] of America, and/or its assigns; and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said United States of America, and/or its assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness Our Hands this the 28th day of November 1945.

[stamps affixed]

(S) F. M. Harrison,
F. M. Harrison.

(S) Florence Harrison,
Florence Harrison.

(S) Otis Harrison, *"Trustee,"*
Otis Harrison, *Trustee.*

STATE OF TEXAS,
County of Harris:

[STAMPS AFFIXED]

BEFORE ME, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared F. M. Harrison and wife, Florence Harrison, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed. And the said Florence Harrison, wife of the said F. M. Harrison, having been examined by me privily and apart from her said husband, and having the same fully explained to her, she, the said Florence Harrison, acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purpose and consideration therein expressed, and that she did not wish to retract it.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 28th day of November 1945.

(S) J. S. Kibler,
J. S. KIBLER.
A Notary Public in and for
Harris County, Texas.

STATE OF TEXAS,
County of Harris:

BEFORE ME, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Otis Harrison, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 28th day of November 1945.

(S) J. S. Kibler,
J. S. KIBLER,
A Notary Public in and for
Harris County, Texas.